86-438

Supreme Court U.S.
FILED
AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RONALD M. ROBERTS

PETITIONER,

V.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOHN GENINS
COUNSEL OF RECORD,
P.O. BOX 14303
ATLANTA, GA., 30324
(404) 523-2838

PETITIONER'S COUNSEL

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1.

Whether fundamental due process rights to testify and present witnesses on one's own behalf--an opportunity to be heard--may be denied by the Merit Systems Protection Board, where the already terminated employee had a statutory and regulatory right to a hearing, which inherently included such due process rights.

a.

Whether such rights are dependent upon a presiding official's arbitrary conclusory adjudication that the employee's counsel is guilty of "disruptive conduct".

c.

Whether such a conclusory adjudication that counsel is guilty

of "misconduct" or such "disruptive conduct", so as to warrant his client's denial of the fundamental due process right to be heard--without specification of the facts upon which such conclusion is based or of any evidence upon which such conclusion is based--is itself a denial of due process under the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i,ii
REPORTS OF OPINONS.....	1
JURISDICTION.....	1-2
CONSTITUTIONAL PROVISION, STATUTE & REGULATION INVOLVED	2-3
STATEMENT OF THE CASE.....	3-11
ARGUMENT	11-17
CONCLUSION	17

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES:	
United States Constitution, Amendment V	2
5 U.S.C. Section 7701	2,3
5 U.S.C. Section 7703	7,11, 13,15
AGENCY REGULATION 5 C.F.R. Sec. 1201.24(c)	3

CASES CITED:

Page

Baltimore & Ohio R. Co. v. U.S., 298 U.S. 349 12

Black v. Romano, 471 U.S.___ 14

Cleveland Board of Education v. Loudermill, _____U.S._____ 12-13

Davis v. Scherer, 486 U.S.____ 13

Grannis v. Ordean, 234 U.S. 385 12

Interstate Commerce Commission v. Louisville & Nashville R.Co. 227 U.S. 88 12

Londener v. Denver, 210 U.S.373.12

Maier v. Ohio, 758 F.2d 1578 14

Superintendent v. Hill,

_____U.S.____.....14

FEDERAL CIRCUIT JUDICIAL CONFERENCE TRANSCRIPTS

108 F.R.D. 465 15,16,17

100 F.R.D. 499 17

REPORTS OF OPINIONS

Petitioner does not believe there are any official or unofficial reports of any opinions below. Copies of same, as received by petitioner, are included in the appendix filed herewith.

JURISDICTION

On April 23, 1986, the judgment sought to be reviewed herein, was entered by the Court of Appeals for the Federal Circuit.

On May 28, 1986 that Court's order was dated and entered denying petitioner's motion for rehearing; and, on June 9, 1986 that Court's order was dated and entered declining petitioner's suggestion for rehearing in banc. Both actions were in response to petitioner's joint motion for rehearing and suggestion for rehearing in banc, filed therein on May 7, 1986.

The juridiction of this court is invoked under Title 28 United States Code

Section 1254.

CONSTITUTIONAL PROVISION, STATUTE & REGULATION INVOLVED

The Constitutional provision which this case involves is the due process clause of the Fifth Amendment to the United States Consitution:

"No person shall ...be deprived of life, liberty or property, without due process of law;..."

The statutory provision which this case involves is Title 5 United States Code Section 7701. "Appellate procedures

(a) An employee, or an applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--

(1) to a hearing for which a transcript will be kept; and,

(2) to be represented by an attorney or other representative. Appeals shall be processed in accordance with regulations prescribed by the Board."

The agency regulation which this case involves is 5 C.F.R. Sec. 1201.24(c)

"Right to hearing.

Under 5 U.S.C. 7701, an appellant has a right to a hearing. Alternatively, the appellánt may choose to have the determination based on the record. "

STATEMENT OF THE CASE

Petitioner's employment with the Federal Aviation Agency was proposed terminated and adjudicated terminated by his facility chief, Ray G. Fitzpatrick, on his charge of "failure to complete training requirements".[1]

Petitioner acting pro se filed a timely appeal pursuant to the aforesaid statute and regulation and requested a hearing thereon. The undersigned represented petitioner at the "hearing" and in all stages of this case thereafter.

Petitioner's appeal of his employment termination was adjudicated denied-without giving petitioner his fundamental due process right to be heard.

The "hearing" was closed by the Presiding Official when Mr. Fitzpatrick's testimony was in the process of being impeached, petitioner was not allowed to testify.

The presiding official stated she was closing the hearing because she said the undersigned would not follow her directions. She also announced she would render her decision on only what she had "heard". She did so, in a lengthy opinion

which is copied in the appendix filed herewith.

Her findings of fact relative to the merits of the controversy may not be challenged because she only heard one side of the controversy-petitioner was not allowed to testify.

Her decision made a one sentence reference to the closing of the hearing-that it was "due to the disruptive conduct of the appellant's attorney"--without any specification thereof.

Throughout the subsequent appeals to the full Merit Systems Protection Board and then to the Court of Appeals to the Federal Circuit, petitioner's briefs have begged opposing counsel to cite <u>any</u> item from the record of the "hearing" evidencing any misconduct by petitioner's attorney.

Petitioner included a transcript of the entire "hearing" as an appendix in the Court of Appeals.

Each of respondent's briefs, throughout the appeals herein, is absolutely devoid of any reference to the evidence, to substantiate misconduct.

The transcript of the "hearing" has been in the possession of the Respondent, the full Merit Systems Protection Board, and was filed as an appendix by petitioner in the Court of Appeals.

Petitioner even tried "to prove negative" by a brief filed in the Court of Appeals to analyze his rationale for what were legitimate cross examination questions, and how he had abided by the directions of the presiding official.

The opinions of both the Merit Systems Protection Board and the Court of Appeals simply conclude, conclude that as a fact there was misconduct.

Those opinions, then erroneously conclude legally that because of their

BEST AVAILABLE COPY

erroneous factual conclusion (that there was misconduct at the hearing by petitioner's attorney (when the record manifests there was none) that petitioner's fundamental constitutional right to be heard, was legally denied.

The Court of Appeals was the Court with federal jurisdiction in the first instance, pursuant to Title 5 United States Code Section 7703; and, should have reversed and remanded for a real hearing pursuant to all of the three subparagraphs of section (c) thereof.

1 The Court of Appeals opinion erroneously finds as a fact that petitioner in three instances failed to report for scheduled training-which is contradicted by Mr. Fitzpatrick's own admission at the "hearing". The one instance petitioner did not report was due to petitioner's belief that his successful completion of same, would

be subject to Mr. Fitzpatrick's desires (which had been manifested when he had not provided petitioner with travel funds only a few hours before petitioner was scheduled to be in school in Oklahoma) because the F.A.A. school there had been subject to the local facility chief's influence as to who passed the Oklahoma school's training.

The presiding official refused to hear testimony of this fact from Mr. Fitzpatrick's predecessor, at petitioner's facility.

This may be the actual reason for this case's treatment.

The documents filed as the record by the F.A.A. prior to the hearing, undisputably show that when the Regional Office of the F.A.A. informed petitioner that the Oklahoma school was no longer subject to influence by the local facility's chief, petitioner requested that he be scheduled immediately for training in Oklahoma; and, that two weeks thereafter Mr.

Fitpatrick intiated the proceedings for petitioner's termination--rather than schedule petitioner for training in Oklahoma.

Petitioner was a full time permanent employee of the F.A.A. That he had a vested property interest in his job entitling him to due process is not disputed.

Petitioner raised his due process contentions contained herein before the Merit Systems Protection Board and the Court of Appeals.

Petitioner appropriately requested oral argument before the Court of Appeals--which simply sent him a request to distinguish this case from all of the other F.A.A. cases resulting from the F.A.A. controller's strike and the President's termination of their employment consequent thereon. When petitioner did so distinguish this case,

the Court of Appeals simply entered its opinion and judgment without allowing oral argument.

Petitioner's request for oral argument was as follows:

> " I believe that the oral argument would aid the Court in deciding the captioned matter because; in my opinion:
>
> 1.
>
> The appeal is not frivilous; and,
>
> 2.
>
> The dispositive issue has not to my knowledge been recently decided; and,
>
> 3.
>
> I believe that the decisional process would be significantly aided by oral argument; wherein, opposing counsel may once again have an opportunity to support with specification from the transcript their conclusory allegations that my conduct at the hearing was so egregious that the presiding official was warranted in closing the hearing without even giving my client an opportunity to present his side of the controversy, or even testify."

The panel of the Court of Appeals which issued the opinion was composed of two Judges, with prior experience in patent and trademark law (including the author) and the other with the

Department of Justice, Tax Division. They apparently felt the Court of Appeals had no jurisdiction to "disturb" the Merit Systems Protection Board decision.

ARGUMENT

Petitioner respectfully submits the Court of Appeals plainly overlooks the clear provisions of Title 5 United States Code Sec. 7703(c).

Minimally, the Merit Systems Protection Board decision was obtained without the procedures required by law being followed. Petitioner requested and had a statutory and regulatory right to a hearing, with counsel. When he was deprived of his right to be heard- to testify, present his witnesses, and cross-examine his prosecutor not only his statutory and regulatory rights were abridged but also his fundamental

constitutional due process right. That he had such a right to be heard has been protected by this Court since the early years of this century. Grannis v. Ordean, 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S. Ct. 779 (1914); Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 57 L.Ed. 431, 33 S.Ct. 185 (1913); Londener v. Denver, 210 U.S. 373, 386, 52 L.Ed. 1103, 28 S.Ct. 708, 714(1908); Baltimore & Ohio R. Co. v. U.S., 298 U.S. 349, 368-369, 80 L.Ed. 1209, 1224, 56 S.Ct. 797, 807-808 (1936).

Ironically, the pronouncement by this Court upon which Respondent's brief in the Court of Appeals relied for its conclusion that petitioner's "contention that he has been denied his constitional right to procedural due process is totally without merit" is Cleveland

Board of Education v. Loudermill, _____U.S. _____, 84 L.Ed.2 1487, 1491-1497, 105 S.Ct.1487 (1985); which, along with the case cited therein of Davis v. Scherer, 486 U.S. ____, 82 L.Ed.2 139, 154-155, 104 S. Ct.____(1984) are recent directions by this Court that the opportunity to be heard may not be denied.

The "hearing" where these rights were abridged herein was a post termination hearing. Therefore, it appears clear the Court of Appeals erred when it did not apply the provisions of 5 U.S.C. Sec. 7703(c)(2).

Petitioner is unable to find any judicial authority rendering the fundamental constitutional right to be heard, dependent on his counsel's

conduct and none has appeared in respondent's briefs.

Assuming there is such authority or some may deem there should be, any application of same herein would appear to be itself a denial of due process. Superintendent v. Hill, _____U.S._____, 86 L.Ed.2 356,364, 105 S.Ct. _____(1985); Black v. Romano, 471 U.S.___, 105 S.Ct. _____ , 85 L.Ed2 636,647(1985). Any findings of misconduct must be supported by some evidence in the record.

None was cited in respondent's briefs, none was cited in the opinions. The conclusion must be there was none.

It may be noted that the Court of Appeals for the Federal Circuit will not accept conclusory statements (without a factual predicates) to recuse a member of its judiciary. Maier v. Orr, 758 F.2d 1578 (1985). Petitioner has no argument

with this decision; however, simple fairness would seem to require that the same standard be applied to counsel's conduct. Logically, isn't any decision devoid of a factual predicate, clearly proscribed by all three subparagraphs of 5 U.S.C. Sec. 7703?

It is a well know fact that this Court grants the writ of certiorari to only a few petitioners. Obviously, an opinion which was not published may not be as deserving of this Court's consideration. Perhaps, that may be a reason a Court directs nonpublication, as herein. Perhaps, the author of the opinion may have contemplated this in conjunction with her thoughts expressed in 108 F.R.D. 465, that the presiding officials of the Merit Systems Protection

Board are "very good people" who issue and render opinions on a par with those of the federal district courts. 108 F.R.D. 465, 571. Perhaps this has some bearing on the also disclosed fact at the conference that 93% of the Merit Systems Protection Board's decisions are upheld by the Court of Appeals for the Federal Circuit. 108 F.R.D. 465, 556.

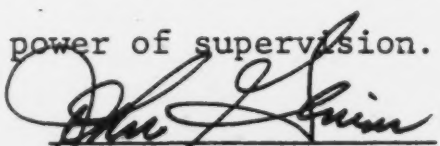
Minimally, what happened herein appears inconsistent with the author of the Court of Appeals opinion statement at the conference that she loves oral argument. 108 F.R.D. 465, 573.

Also, minimally, the undersigned is not the only lawyer who has felt his client was not treated legally

and fairly and also may be why only a few members of the private bar are invited to attend the conference. 108 F.R.D. 465, 551, 564,574; 100 F.R.D. 499, 639-644.

CONCLUSION

It is respectfully submitted that clearly petitioner's procedural due process right to be heard has been denied and the Court of Appeals erred in upholding same; and, that decision is so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.



John Genins
P.O. Box 14303,
Atlanta, Ga., 30324,
(404) 523-2838
Counsel of Record For:
Ronald M. Roberts

CERTIFICATE OF SERVICE

I do hereby certify that all parties required to be served have been served, that being Respondent, Department of Transportation Federal Aviation Administration by my depositing 3 copies of the within Petition as well as 3 copies of the accompanying Appendix (contained in separate envelopes) in a United States mail box, with first class postage prepaid addressed to:

STUART JAMES, ESQ.,
Civil Division, U.S.
Deparment of Justice,
Room 711, 550 11th St.,
Washington, D.C., 20530
and
MARY JONES, ESQ.,
Office of General Counsel,
Federal Aviation
Administration,
Washington, D.C., 20590.

This August 26, 1986.

John Gemins, Counsel for
Petitioner, P.O. Box
14303, Atlanta, Ga.,
30324.